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## Two recent decisions on the battle of the forms (i.e. conflicting standard conditions of contract)

Posted on July 9, 2013 by mhogg

Two decisions of the courts in recent months have focused on a seldom litigated aspect of contract law: the so-called 'battle of the forms', or, to put it less figuratively, on the question of what is to happen when parties' standard terms of contract conflict and there is a dispute as to which set of terms should prevail. The two judgments are analysed below.

### (1) **Specialist Insulation Ltd v Pro-Duct (Fife) Ltd**

The first decision is a judgment of Lord Malcolm in the Outer House of the Court of Session: [\*Specialist Insulation Ltd v Pro-Duct \(Fife\) Ltd\* \[2012\] CSOH 79](#). The litigation raised a number of contractual matters, the relevant one for the present discussion was whether or not an adjudication clause had been incorporated into the parties' contract; if it had not, then the decision of an adjudicator in relation to a dispute between the parties to which the defender had objected as incompetent would not be binding on them. Somewhat unusually for a battle of the forms case, both parties were insisting that the other side's terms and conditions should apply.

The parties' contract had been preceded by two written communications between them:

(i) on 29 October 2010 the pursuer sent a quotation for the supply of ductwork in the sum of £216,819.40. This had stated that the supply was "subject to our standard terms and conditions of trading (available on request)". These terms provided inter alia that any additional conditions of the defender's were excluded unless agreed to in writing by the pursuer, that the pursuer's terms were to prevail in the event of any inconsistency with any other terms, and that any dispute relating to the conditions or the sale was to be referred to arbitration;

(ii) in response, a purchase order was submitted by the defender. Along with this, although not referred to in it, the defender forwarded a document headed "Pro-Duct (Fife) Ltd – Material Supply only Sub-contract Agreement". This document, though its heading referred to 'material supply only', narrated that the defender wished to engage the "sub-contractor" (i.e. the pursuer) to carry out certain work ("the sub-contract works") on a "labour only basis". There was thus an internal inconsistency as to the nature of the contract envisaged, between its being either 'material supply only' or 'labour only'. The price of works was stated as £211,469.12 (note the difference to the price stated by the pursuer). This document was executed on behalf of the defender. Immediately below the defender's signature was the heading "Executed on behalf of the sub-contractor", and then space for the name, signature and date of signature on behalf of the sub-contractor. This document was never executed on behalf of the pursuer. One of the terms in this document was a clause stating that "Either party may refer such disputes as may arise under this contract to adjudication at any time". It was this clause on which the pursuer sought to rely.

As is obvious, the two conceivable sets of terms governing the parties' contract were manifestly inconsistent (and, additionally, the defender's terms were internally inconsistent as to the nature of the contract). The defender sought to apply the pursuer's terms (which made no provision for adjudication); the pursuer sought to apply the terms in the defender's document attached to the purchase order, which did. Lord Malcolm disposed of an initial question – was there a contract at all? – by stating: "It would be unrealistic to hold that the parties had not reached an agreement that the ductwork should be supplied at the specified price". Curiously, Lord Malcolm does

not make clear (at least to this observer) which 'stated price' he means: was it the pursuer's suggested £216,819.40, or the defender's suggested £211,469.12? Ignoring that troubling question, having held that there was a contract, Lord Malcolm recognised that there was a conflict between the two conceivable sets of terms which might govern the contract: "it is difficult to reconcile all of its [i.e. the defender's document] terms with the purchase order, which relates to an order for the supply of movable goods, as opposed to an agreement to carry out sub-contract works on a labour only basis. Amongst other things it provided that the "sub contract works" were to be "in accordance with the following schedule and conditions". It appears that this was a reference to the other forwarded document headed "Conditions of Sub-contract Agreement". It is clear that these conditions were intended to relate to construction or engineering works, or something of that nature."

In Lord Malcolm's view, the original quotation of the pursuer was an offer; on the assumption that the response of the defender (the purchase order, with attached document) was a counter-offer, this envisaged that it was to be accepted by the document being signed by the pursuer. It was not. The sending of the goods by the pursuer was therefore not referable to the defender's counter-offer, but was referable to the terms of its original quotation (which had stated that the pursuer's terms were to apply, unless it agreed otherwise). The defender, in accepting the goods, had therefore accepted the pursuer's terms, and the contract was concluded on that basis, i.e. without the incorporation of any adjudication clause. Lord Malcolm therefore found for the defender, held the decision of the adjudicator to be invalid, and granted decree of absolvitor.

Lord Malcolm might conceivably have held there to be no contract at all: the pursuer had proposed a contract for the supply of goods; the defender bizarrely appeared either to have proposed a 'labour-only' contract, i.e. one for the provision of services, or no contract at all (arguably its terms were inconsistent as to whether the contract was one of supply or of labour, and therefore void for cunertainty). The court could therefore have taken a similar approach to that adopted in *Mathieson Gee (Ayrshire) Ltd v Quigley*, where one party had proposed a contract of hire of goods, the other of hire and the provision of labour: in that case there was held to be no contract, there being dissensus between the parties as to the nature of the contract. While the same result might have prevailed in this case, a more realistic view is that both parties knew that what was envisaged was the simple supply of goods for an agreed price, the defender's inclusion of the language of a labour-only contract apparently the result of infelicitous language used because of the attachment of a not wholly appropriate set of standard terms. But if that is right, and there was a contract, there was an evident problem: if the defender's standard terms used inappropriate or inconsistent language to describe the contract, could those terms be held to govern the contract in any so-called battle of the forms?

The traditional approach to solving such a battle of the forms is to apply a 'last shot' analysis: whoever's terms are stated last are treated as the contractual offer, accepted either by an unqualified agreement to those terms or by performance by the offeree. On that approach, Lord Malcolm's decision might appear suspect: it was the defender's terms which were the 'last shot' (if one assumes, as Lord Malcolm does, that the document accompanying the purchase order was correctly seen as a proposal of contractual terms), and on that basis the conduct of the pursuer in supplying the goods without any demur as to those terms would, one might have expected, have been seen as an unqualified acceptance of those terms. Moreover, the defender's reply being a counter-offer, the pursuer's original offer should have been seen as having been 'killed off', and should not have been open for acceptance by the defender; yet Lord Malcolm holds that it was. Is there anything that can be said in favour of Lord Malcolm's seemingly unorthodox approach, of using the first shot rather than the last shot, and of seeing the original offer as not having been killed off?

Lord Malcolm highlights two matters as being important in his decision: (1) the absence of any signature of the pursuer agreeing to the defender's terms; and (2) the fact that the terms proposed by the defender envisaged a contract of a type (the provision of labour) which was patently inappropriate to what both parties knew was a contract for the supply of goods. On the first point, Lord Malcolm's view is that, because the defender's offer

envisaged that it had to be accepted in writing before a contract was concluded, the supply of goods by the pursuer without such a written acceptance ought not to be seen as referable to the defender's offer, but rather to its own proposed terms: "The pursuer chose not to execute the document proffered by the defender, therefore the goods were supplied on the basis of the pursuer's standard terms – and, given the silence of the defender in respect of the failure of the pursuer to sign and return the said document, the buyer must be taken as having accepted the goods on the same basis." That, however, only works as an argument if the original terms proposed by the pursuer were still on the table, and thus still validly able to be referred to as the basis of the supply. Yet, orthodoxy states that a counter offer kills an original offer, so it is hard to see these original terms could still be seen as live. Things might have been otherwise if the pursuer's terms had been restated at the time of supply, by inclusion along with the goods sent, but they were not (so far as can be ascertained from the reported facts). Only in the rare case where two offers are on the table at the same time, is it possible to attempt to argue that performance relates to one or other, as the case may be. Such cases are very unusual, and one might have expected that if such dual offer reasoning was being utilised, a case of this type might have been cited in support; none was. Instead, Lord Malcolm refers to the dubious idea that the pursuer had ring-fenced its terms by stating, at the outset, that those terms were to apply unless they agreed otherwise in writing in what may be styled an 'over-riding clause'; but the efficacy of such 'first shot' ring-fencing has been specifically rejected in Scots law.

On the second point, Lord Malcolm might be on firmer ground: the defender did seem to be proposing what could be described either as internally inconsistent, and thus incoherent, terms, or else terms for a contract of a sort (labour only) which was patently inapplicable to the envisaged transaction. Holding such terms as governing the contract would have been ludicrous: how could internally inconsistent terms, or terms of a 'labour only' contract, govern a contract for the supply of goods? So one might argue that, if such terms could not govern the contract, it would have to be the other party's terms (clearly specified as relating to a supply only contract) which governed the transaction. This offers a more persuasive way of justifying the result: if the terms proposed by the defender were internally inconsistent, they could not constitute a valid offer (any contract concluded on the basis of them would be void for uncertainty). That would therefore mean that the only valid offer capable of acceptance was that of the pursuer's, and this offer could be argued to have been accepted by the defender's conduct in taking delivery of the goods. This argument would, of course, depend on the pursuer's offer still being open for acceptance, i.e. as not having been impliedly rejected by the issuing of an invalid offer by the defender. That might plausibly be argued, given that existing authority only goes so far as stating that a valid counter offer destroys an original offer; by extension, an invalid offer could be argued as not having destroyed an original offer (it is not, after all, an express rejection of the original offer).

Lord Malcolm does not quite go so far as adopting this reasoning, however, as he seems to envisage the defender's communication as a valid offer, albeit one subject to some difficulties given the internally conflicting terminology used in it. He prefers to rely mostly on the first (dubious) point noted above, with only secondary reliance being placed on the notion of the defender's terms being inappropriate for the type of contract envisaged. As such, his decision is open to the legitimate criticism that it is not consistent with the orthodox approach to the battle of the forms, and comes dangerously close to a 'first shot' approach which seeks to ring fence the pursuer's 'our terms prevail' provision. It also seems, arguably, to place too much emphasis upon the defender's expectation that their offer would be accepted by the pursuer's signature. In a Supreme Court case from 2010 (*RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co* [2010] UKSC 14), parties' original intentions that written terms would govern the contract only if accepted in writing, were held superseded by subsequent performance, the need for such written acceptance having been overtaken by such performance. That approach of the Supreme Court seems out of step with Lord Malcolm's preoccupation with the lack of a signed acceptance by the pursuer of the defender's terms.

## (2) **Grafton Merchandising Gb Ltd t/a Buildbase v Sundial Properties (Gilmerton) Ltd**

This second decision is an unreported decision of the Edinburgh Sheriff Court, given on 30th January this year. In

this case, the defender applied to the pursuer for a trade credit account. The application form which the defender completed and returned contained the pursuer's terms and conditions. Condition 5(a) of those terms provided that payment for goods supplied on a credit account, unless otherwise agreed in writing by the pursuer, was due and payable not later than the last day of the month following the month of delivery. In an attempt to pre-empt a purchaser relying on the purchaser's own terms and conditions in a subsequent purchase order, condition 1 of the pursuer's conditions provided:

"All orders are accepted by the Company solely on these Terms and Conditions, which override any terms and conditions stipulated, incorporated or referred to by the Customer whether in its order or any negotiations. No variation or addition to these Terms and Conditions shall be incorporated into the Contract unless such variation or additions and the Company's agreement thereto are both expressly agreed in writing."

This term therefore attempted to act as a 'first shot' which would ring fence the pursuer's conditions and trump any attempt later shots.

The defender submitted a purchase order on 14 April 2009 for cedar deckboard in response to a quotation from the pursuer of the same date. The purchase order referred to the order being subject to the defender's terms and conditions (which it averred were printed on the back of the purchase order). Condition 15 of those conditions provided that the defender had the right to require the goods to be delivered according to schedules submitted by them, and that it had the right to defer or suspend deliveries. The defender requested that the pursuer store the goods ordered, to which request the pursuer agreed. Two and a half years later, in September 2011, the pursuer wanted payment for the remainder of the goods and rendered an invoice. The defender refused to pay because it had not requested delivery. The pursuer sued for payment on the ground that, under its conditions, the defender was bound to take delivery and pay for the goods. The defender pleaded that, by virtue of its condition 15 which the pursuer had accepted, the defender had not requested delivery, and it did not have to pay until delivery. The odd twist to this particular battle of the forms case was that the defender admitted that the pursuer's conditions applied, but averred that the defender's conditions also applied (it did so in order to try to take advantage of one of pursuer's conditions, condition 5(a), which stated that a buyer did not have to pay for goods until the last day of the month following the month of delivery). This was not therefore a standard case where each party was arguing that its conditions applied instead of the other's.

Perhaps unsurprisingly, given the apparent non-application of the orthodox approach to the battle of the forms in the earlier decision of Lord Malcolm in *Specialist Insulation Ltd v Pro-Duct (Fife) Ltd*, that earlier case was relied upon by the pursuer in an attempt to argue that it had ring-fenced its terms through its 'first shot'. The Sheriff however distinguished this earlier case on the basis that the outcome of *Specialist Insulation* had been dependent upon the judicial view expressed in it that the defender's terms envisaged signature as a prerequisite to their being accepted (which had not occurred): it was that factor (in the Sheriff's view), rather than an attempted ring-fencing of the pursuer's terms in the 'first shot', which had determined that the defender's terms had not applied. Such ring-fencing as was attempted in condition 1 of the pursuer's terms in this case could not work as a means of guaranteeing that 'first shot' terms prevailed in all cases, because such a ring-fencing clause would only become operative if the terms in which it was contained were unqualifiedly accepted. That was not what had happened: the defender had issued a counter offer when it submitted its purchase order. The pursuer had then proceeded to process the order and had written on or about 16 April 2009 stating that it was in a position to deliver the goods. It therefore appeared to the Sheriff as if the pursuer had to be regarded as having accepted the defender's conditions, though he was not willing to so hold conclusively until a proof was held on the question of whether, as the defender averred, its terms had been brought to the pursuer's attention by having been printed on the back of its purchase order.

**OVERVIEW:** The second of these two decisions is more in line with the orthodox approach to the battle of the

forms; by contrast, one has to do some work to make Lord Malcolm's decision in *Specialist Insulation* fit with orthodoxy, given its reliance on the somewhat uncertain argument that the defender's terms could not prevail, despite delivery of the goods by the pursuers, because of the lack of an expected signature. A stronger case (discussed above) might have been made for the result, but supportive reasoning for such a case is lacking from the judgment. It would be surprising to this observer if the reasoning adopted in *Specialist Insulation* was to find much support in the higher courts.

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